UNIVERSAL CABLE (M) BHD

v.

BAKTI ARENA SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: S5-22-101-1998]
29 FEBRUARY 2000

CIVIL PROCEDURE: *Set-off - Counterclaim - Difference between set off and counterclaim*

CONTRACT: *Guarantee - Guarantor - On demand guarantee - Whether can be sued concurrently with principal debtor*

SALE OF GOODS: *Condition and warranties - Shortage of supply - Goods not according to specification - Acceptance of delivered goods - Lost of right of rejection*

The plaintiff commenced an action for the sum outstanding for the goods sold and delivered to the 1st defendant, against the 1st defendant as the principal debtor and against the 2nd and 3rd defendants as the guarantors. The plaintiff then filed O. 14 applications against defendants but they were dismissed by the SAR. The plaintiff appealed. The 1st defendant in his defence alleged that on several occasions the plaintiff had either failed to deliver what it had ordered or the delivery was not made on time. The 1st defendant further claimed that due to this purported breach of contract, it was unable to honour its contract with a third party and therefore pleaded set-off of the sum claimed in the statement of claim. Meanwhile, the 2nd and 3rd defendants raised the issue that the claim against them was premature.

Held:

[1] As there was acceptance of those delivered goods, the 1st defendant had lost its right to reject those goods and the remedy available to the 1st defendant, if at all, would be confined to damages.

[2] The 1st defendant having taken delivery of the goods must be held accountable for the payment of those goods and the plaintiff was entitled to sue for the price thereof.

[3] The appropriate remedy available to 1st defendant based on the factual matrix of the case would be by way of a counterclaim and not set-off, alternatively, the 1st defendant has the option to sue the plaintiff separately in damages for breach of warranty.

[4] The plaintiff as creditor can proceed after both the 2nd and 3rd defendants who were the guarantors to the whole transaction, if the 1st defendant as principal debtor was unwilling to pay the outstanding debt.

[5] The liability to pay under the guarantee and indemnity is emphasised by the guarantors' express undertakings to pay on demand and on full indemnity basis when and upon the first defendant's default in payment.

[Appeal allowed.]

Case(s) referred to:

Associated Tractors Sdn Bhd v. PMB (Kulim) Sdn Bhd & Ors [1989] 1 MLJ 245 ***(refd)***

Avel Consultants Sdn Bhd & Anor v. Mohd Zain Yusof & Ors [1985] 2 MLJ 209 ***(refd)***

B Sunley & Co Ltd v. Cunard White Star Ltd [1940] 1 KB 740 ***(refd)***

Bank Bumiputra Malaysia Bhd v. Esah Abdul Ghani [1985] 2 CLJ 409 ***(foll)***

Bank Bumiputra Malaysia Bhd v. Perbadanan Kemajuan Negeri Perak [1989] 1 CLJ 1051 ***(refd)***

Behn v. Burness [1863] 3 B & S 751 ***(refd)***

Behrend & Co Ltd v. Produce Brokers' Co Ltd [1920] 3 KB 530 ***(refd)***

Bentsen v. Taylor, Sons & Co (2) [1893] 2 QB 274 ***(refd)***

Berger & Co Inc v. Gill & Duffus SA [1984] AC 382 ***(refd)***

Bremer Handelsgesellschaft mbH v. Vanden Avenne – Izegem PVBA [1978] 2 Lloyd's Rep 109 ***(refd)***

Bunge Corpn v. Tradax SA [1981] 2 All ER 513 ***(refd)***

Chatterton v. Maclean [1951] 1 All ER 761 ***(refd)***

Cehave NV v. Bremer Handelsgesellschaft mbH, The Hansa Nord [1976] QB 44 ***(refd)***

Chen Heng Ping & Ors v. Intradagang Merchant Bankers (M) Bhd [1995] 3 CLJ 690 ***(refd)***

Chong Chow Fong v. Ban Tuck (M) Sdn Bhd [1983] 2 CLJ 25 ***(refd)***

Commonwealth of Australia v. Amann Aviation Pty Ltd [1991] 174 CLR 64 ***(refd)***

Daya Anika Sdn Bhd v. Kuan Ah Hock [1998] 5 CLJ 200 ***(refd)***

Dick Bentley Productions Ltd v. Harold Smith (Motors) Ltd [1965] 2 All ER 65 ***(refd)***

Eastern Supply Co v. Kerr [1974] 1 MLJ 1 ***(foll)***

Ellis & Ellis v. Hodder & Tolley Ltd [1913] 33 NZLR 362 ***(refd)***

Emperee Industries Sdn Bhd v. Genageo Sdn Bhd [1987] 1 CLJ 477 ***(refd)***

Fabrique Ebel Societe Anonyme v. Syarikat Perniagaan Tukang Jam City Port & Ors [1989] 1 CLJ 919 ***(refd)***

Fairbanks, Lavendar & Son v. Low Bros [1893] 12 NZLR 302 ***(refd)***

Farley & Farley v. Loughnan [1917] NZLR 588 ***(refd)***

Gill & Duffus SA v. Berger & Co Inc [1984] 1 All ER 438 ***(refd)***

Gissco Sdn Bhd v. Blackgold (M) Sdn Bhd [1988] 2 MLJ 397 ***(refd)***

Hadley v. Baxendale [1854] 9 Ex 341 ***(refd)***

Harland & Wolf Ltd v. J Burstall & Co [1901] 6 Com Cas 113 ***(refd)***

Heilbut, Symons & Co Ltd v. Buckleton [1913] AC 30 ***(refd)***

Huo Heng Oil Co (EM) Sdn Bhd v. Tang Tiew Yong [1987] 1 MLJ 139 ***(refd)***

Koufos v. Czarnikow Ltd [1969] 1 AC 350 ***(refd)***

Lep Air Services case [1973] AC 331 ***(refd)***

MG Sheth & Ors v. Lam Thye Co Ltd [1954] 20 MLJ 230 ***(foll)***
Miles v. Bull [1968] 3 All ER 632 ***(refd)***
Mok Hin Wah & Ors v. United Malayan Banking Corp Bhd [1987] 2 MLJ 610 ***(refd)***
Mondel v. Steel [1841] 8 M & W 858 ***(refd)***
Montague L Meyer Ltd v. Kivisto [1929] 216 TLR 162 ***(refd)***
Montague L Meyer Ltd v. Travaru A/B H Cornelius of Gamleby [1930] 46 TLR 553 ***(refd)***
Mulpha Engineering Sdn Bhd v. Polycool Engineering & Trading Sdn Bhd & Ors [1994] 2 CLJ 634 ***(foll)***
National Company for Foreign Trade v. Kayu Raya Sdn Bhd [1984] 2 CLJ 220 ***(refd)***
Ng Yik Seng & Anor v. Perwira Habib Malaysia Bhd [1980] 2 MLJ 83 ***(refd)***
Ngui Mui Khin & Anor v. Gillespie Bros & Co Ltd [1980] 2 MLJ 9 ***(refd)***
Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri Wan Rashid v. Kwong Yik Bank Bhd [1989] 3 MLJ 155 ***(refd)***
Oscar Chess Ltd v. Williams [1957] 1 All ER 325 ***(refd)***
Permodalan Plantations Sdn Bhd v. Rachuta Sdn Bhd [1985] 1 CLJ 62 ***(foll)***
Perwira Habib Bank Malaysia Bhd v. Fast Travel (M) Sdn Bhd & Ors [1988] 3 MLJ 210 ***(refd)***
Perwira Habib Bank Malaysia Bhd v. Syarikat Johor Tenggara Sdn Bhd & Anor [1989] 2 CLJ 470 ***(refd)***
Popular Industries Ltd v. Eastern Garment Manufacturing Sdn Bhd [1990] 1 CLJ 133 ***(refd)***
Re General Rail Syndicate, Whiteley's case [1900] 1 Ch 365 ***(refd)***
Robinson v. Harman [1848] 1 Ex 850 ***(refd)***
Siow Kwang Joon & Anor v. Asia Commercial Finance (M) Bhd [1996] 3 MLJ 641 ***(refd)***
SM Appaduray v. R Ananda [1982] 1 MLJ 292 ***(refd)***
The Edison [1932] P52 ***(refd)***
Tradax International SA v. Goldschmidt SA [1977] 2 Lloyd's Rep 604 ***(refd)***
Tsakiroglou & Co Ltd v. Transgrains SA [1958] 1 Lloyd's Rep 562 ***(refd)***
United Malayan Banking Corporation Bhd v. Tan Lian Keng & Ors [1990] 1 MLJ 280 ***(refd)***
Voo Min En v. Leong Chung Fatt [1982] 2 MLJ 241 ***(refd)***
Wallingford v. Mutual Society [1880] 5 App Cas 685 ***(refd)***
Wallis, Son and Wells v. Pratt and Haynes [1910] 2 KB 1003 ***(refd)***
Wertheim v. Chicoutimi Pulp Co [1911] AC 301 ***(refd)***
Wilensko Slaski Towarzystwo Drewno v. Fenwick & Co Ltd [1938] 3 All ER 429 ***(refd)***
William Barker (Junior) Co Ltd v. Ed T Agnius Ltd [1927] 43 TLR 751 ***(refd)***

Legislation referred to:
Evidence Act 1950, ss. 91, 92
Rules of the High Court 1980, O. 14 r. 2, O. 18 r. 17
Sale of Goods Act 1957, ss. 2, 4(1), (2), (3), (4), 12(1), (3), (4), 13, 37, 42, 59(1)(a), (2)

Other source(s) referred to:
Halsbury's Laws of England, 4th edn, para 190

For the plaintiff - Daphne Choy; M/s Derek Chew & Co
For the defendants - Alvin John; M/s Francis Goh, Alvin John & Co

Reported by Izzaty Izzuddin

JUDGMENT

Abdul Malik Ishak J:

Introduction

The plaintiff filed two summonses-in-chambers: one, dated 22 June 1998 (encl. 14), and the other, dated 12 February 1999 (encl. 29) seeking, *inter alia*, an order for summary judgment to be entered against the second and the third defendants (encl. 14) and the first defendant (encl. 29) pursuant to O. 14 of the Rules of the High Court 1980 ("RHC").

On 28 May 1999, the senior assistant registrar ("SAR") heard encls. 14 and 29 and forthwith dismissed it with costs. The SAR's decision favoured all the defendants. Being aggrieved, the plaintiff filed a notice of appeal to the judge in chambers dated and filed on 2 June 1999 (encl. 34) against the decision of the SAR. This judgment centred entirely on encl. 34.

In so far as encl. 14 was concerned, the relevant affidavits considered by this court would be:

(1) the affidavit of Leong Kok Kheng affirmed on 22 June 1998 in encl. 13;

(2) the affidavit of Ho Foon Foo affirmed on 2 July 1998 in encl. 18; and

(3) the affidavit in reply of Leong Kok Kheng affirmed on 17 July 1998 in encl. 22.

In regard to encl. 29, the relevant affidavits for perusal would be:

(1) the affidavit of Khoo Eng Guan affirmed on 12 February 1999 in encl. 28;

(2) the affidavit of Ho Foon Foo affirmed on 15 March 1999 in encl. 30; and

(3) the affidavit in reply of Khoo Eng Guan affirmed on 7 April 1999 in encl. 32.

When the SAR heard and dismissed encls. 14 and 29 with costs on 28 May 1999, all the defendants have yet to file their defences. The first defendant's statement of defence and counterclaim dated 14 June 1999 was filed on 15 June 1999 as seen in encl. 35. The second and the third defendants' statement of defence dated 16 June 1998 was filed on the same date as seen in encl. 12.

The Plaintiff's Statement Of Claim

The plaintiff's claim was for a sum of RM304,988.22 calculated from 23 July 1997 till the date of full payment together with interest at the rate of 1.5% per month together with costs. That sum claimed being the outstanding sum for goods sold and delivered to the first defendant. The plaintiff also brought and instituted the claim for the same amount and at the same rate of interest together with costs against the second and the third defendants who stood as guarantors pursuant to the guarantee and indemnity dated 4 July 1997.

The Statement Of Defence And Counterclaim Of The First Defendant

In their defence dated 14 June 1999 as seen in encl. 35, the first defendant admitted the sale and delivery of the goods from the plaintiff but denied owing a sum of RM304,988.22 and put the plaintiff to strict proof thereof (see para. 4 of encl. 35). The first defendant pleaded the following defences:

(i) that the plaintiff was not entitled to charge penalty interest at the rate of 1.5% per month (see para. 5 of encl. 35);

(ii) that the plaintiff failed to deliver the goods in conformity with specifications, quantity, time and price as set out in the purchase orders of the first defendant (see para. 6 of encl. 35);

(iii) that the first defendant was entitled to a set-off of the sum of RM304,988.22 on the ground that the plaintiff's purported breach of contract had caused the first defendant to suffer loss as the first defendant was unable to honour their contracts with a third party, namely, HKH Engineering (M) Sdn Bhd (see para. 7 of encl. 35).

The first defendant counterclaimed for a sum of RM326,323.55 for loss of profits.

The Statement Of Defence Of The Second And The Third Defendants

In their statement of defence in encl. 12, the second and the third defendants denied any sale and delivery of the goods to the first defendant and put the plaintiff to strict proof thereof (para. 4 of encl. 12). The second and the third defendants too denied executing the guarantee and indemnity dated 4 July 1997 (para. 6 of encl. 12). In the alternative, both the second and the third defendants pleaded the following defences:

(i) that there was no consideration for the guarantee and indemnity dated 4 July 1997 because the plaintiff had not given time and credit to the first defendant as provided for in that guarantee and indemnity (para. 7(a) of encl. 12);

(ii) that the terms and credit to be given by the plaintiff to the first defendant was unclear and cannot be ascertained (para. 7(b) of encl. 12);

(iii) that the interest rate of 1.5% per month was not agreed upon by the second and the third defendants and it constituted a penalty (para. 7(c) of encl. 12);

(iv) that the current proceedings were premature because the time and credit agreed by the plaintiff to be extended to the first defendant have yet to expire and/or agreed to between the parties (para. 8 of encl. 12);

(v) that the plaintiff failed to deliver the goods in conformity with the specifications, quantity, time of delivery and price as set out in the purchase orders of the first defendant (para. 9 of encl. 12).

The Law On Order 14 Application

A summary judgment is the shortest route to obtain judgment without the necessity of leading evidence in open court. It is an efficacious, expeditious and speedy procedure that permits the plaintiff to dispose of an action especially where the defendant's defence is, in law, clearly unsustainable and the facts favouring the plaintiff can never be doubted. In the long run, it saves time and cost. The preliminary requirements for an O. 14 application have been lucidly laid down by Seah FJ (as he then was) in *National Company for Foreign Trade v. Kayu Raya Sdn Bhd* [1984] 2 CLJ 220; [1984] 2 MLJ 300 on the following terms:

(i) the defendant must have entered an appearance;

(ii) the statement of claim must have been served on the defendant; and

(iii) the affidavit in support of the application must comply with the requirements of O. 14 r. 2 of the RHC.

To counter an O. 14 application, the defendant needs to show that there is a triable issue as to fact or a question of law. The defendant needs to raise not just an issue, he must raise an arguable issue which requires a trial to adjudicate it (*Voo Min En v. Leong Chung Fatt* [1982] 2 MLJ 241). The defendants in *United Malayan Banking Corporation Bhd v. Tan Lian Keng & Ors* [1990] 1 MLJ 280 alleged that there was a representation made by the plaintiff's manager to them, which evidence should be admitted in determining a guarantee agreement. But the court held that such an agreement, if admitted, would vary or contradict the terms of the guarantee and thus ran foul of ss. 91 and 92 of the Evidence Act 1950 and, consequently, the court entered summary judgment against the defendants. In the case of *Ng Yik Seng & Anor. v. Perwira Habib Malaysia Bhd* [1980] 2 MLJ 83, the defendants there raised an issue of genuineness as to their signatures in a guarantee agreement and

the court held that that was a triable issue. In the case of *SM Appaduray v. R. Ananda* [1982] 1 MLJ 292, the defendants there challenged the accuracy of the survey in respect of the land encroachment and the court held that it was a triable issue. It was held in *Avel Consultants Sdn Bhd & Anor. v. Mohd Zain Yusof & Ors.* [1985] 2 MLJ 209 that when a breach of fiduciary duty was proved in relation to an action for account and unliquidated damages, summary judgment would be entered while the question of assessment of damages and the rendering of accounts to be dealt with later. In *Miles v. Bull* [1968] 3 All ER 632, Megarry J (as he then was) at p. 637 of the report, in fine language, said:

> Under rule 3 and rule 4 of the present RSC Order 14, the defendant can obtain leave to defend if ... the defendant satisfies the court 'that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial'. These last words seem to me to be very wide. They also seem to me to have special significance where (as here) most of all of the relevant facts are under the control of the plaintiff, and the defendant would have to seek to elicit by discovery, interrogatories and cross-examination those which will aid her.

In the same passage, the learned judge continued to say:

> If the defendant cannot point to a specific issue which ought to be tried, but nevertheless satisfies the court that there are circumstances that ought to be investigated, then I think those concluding words are invoked. There are cases when the plaintiff ought to be put to strict proof of his claim, and exposed to the full investigation possible at a trial; and in such cases it would, in my judgment, be wrong to enter summary judgment for the plaintiff.

Later, in the same passage, the learned judge said:

> The words 'there ought for some other reason to be a trial' seem to me to give the court adequate powers to confine RSC Order 14 to being a good servant and prevent it from being a bad master. If I may adopt the language of Lord Parker of Waddington in *Daimler Co. Ltd v. Continental Tyre and Rubber Co. (Great Britain) Ltd* (1916-17) All ER Rep 191, referred to in the notes to RSC Order 14 in the Supreme Court Practice 1967, if the circumstances of the case are 'such as to require close investigation', this will 'preclude the propriety of giving leave to sign judgment under Order 14, rule 1'. The question is thus whether this is such a case.

As to whether an issue is triable is dependent on the facts or the law arising from each case as disclosed in the affidavit evidence. The facts would certainly vary from case to case and no two cases are alike. For instance, the court in *Associated Tractors Sdn Bhd v. PMB (Kulim) Sdn Bhd & Ors* [1989] 1 MLJ 245 held that there was an admission by the defendant in a letter and consequently no reliance could be placed on the statement of defence which was filed some ten months after the issue of the letter of admission. The case

of *Ngui Mui Khin & Anor. v. Gillespie Bros & Co. Ltd* [1980] 2 MLJ 9 makes for interesting reading. In that case the defendant guarantors raised the issue that guarantees were moneylending transactions and would be unenforceable against the defendants. But the court was wiser and held that the plaintiff did not operate a moneylending business and ruled that the defendants' statement of defence did not disclose any serious defence requiring trial at all. Since there was no triable issue, the court held that the plaintiff's application for summary judgment was allowed.

In challenging an application for summary judgment, it is not sufficient for the defendant to raise a mere denial of indebtedness in his defence (*Wallingford v. Mutual Society* [1880] 5 App Cas 685 at 709; *Huo Heng Oil Co. (E.M.) Sdn Bhd. v. Tang Tiew Yong* [1987] 1 MLJ 139; *Fabrique Ebel Societe Anonyme v. Syarikat Perniagaan Tukang Jam City Port & Ors.* [1989] 1 CLJ 919; [1988] 1 MLJ 188; and *Gissco Sdn. Bhd v. Blackgold (M) Sdn. Bhd.* [1988] 2 MLJ 397). In *Chen Heng Ping & Ors v. Intradagang Merchant Bankers (M) Bhd* [1995] 3 CLJ 690; [1995] 2 MLJ 363 at 367, Shankar JCA was of the view that denials in a defence cannot be considered as evidence and his Lordship suggested that the defendant must provide answers on oath which constitute evidence that they have a defence which was fit to be tried. It would be ideal if the defendant says that he is not indebted to the plaintiff, then it is up to the defendant to explain as to why he is not so indebted (*Re General Rail Syndicate, Whiteley's case* [1900] 1 Ch 365). In the event, the defendant can show some other reason for a trial then summary judgment would not be granted. In such a situation, so long as the court is satisfied that there are circumstances that ought to be investigated, summary judgment will not be entered against the defendant (*Miles v. Bull (supra)*).

So much for the law.

I will now proceed to examine some of the salient issues that were raised by the parties, not in its order of priority. For a start, I shall focus my attention to two interesting issues simultaneously and they may be stated as follows:

(1) **The plaintiff failed to deliver the goods in conformity with the specifications, quantity, time of delivery and price as set out in the purchase orders of the first defendant**

(2) **The issues of set-off and counterclaim**

An examination of encl. 30, exh. "HFF 1" would show the relevant purchase orders and the delivery orders that transpired between the plaintiff and the first defendant. A comparison between the purchase orders and the delivery orders will now be undertaken:

(a) Purchase order no: 0936 dated 31 December 1996

(i) In regard to Item 1 in the purchase order, the plaintiff delivered the goods on 25 March 1997 under delivery order no: 82714.

(ii) In regard to Item 2 in the purchase order, the plaintiff delivered the goods on 25 March 1997 under delivery order no: 82714.

(iii) In regard to Item 3 in the purchase order, the plaintiff delivered the goods on 28 April 1997 under delivery order no: 8408.

(iv) In regard to Item 4 in the purchase order, the plaintiff delivered the goods on 12 April 1997 under delivery order no: 0835.

(v) In regard to Item 6 in the purchase order, the plaintiff delivered the goods on 21 May 1997 under delivery order no: 8499.

Bearing in mind that the time of delivery of the goods was expressly stipulated to be by "early March 1997", it was argued that there was thus a breach of an express term of the contract when the goods were delivered beyond the stipulated time period. It was, so the submission went, crucial to emphasise that "time is of the essence" of the contract.

(b) Purchase order no: 0989 dated 7 May 1997

(i) In regard to Item 2 in the purchase order, there was no delivery of the goods by the plaintiff at all.

(ii) In regard to Item 3 in the purchase order, the plaintiff made a delivery of a quantity of 190 coils on 15 July 1997 under delivery order no: 87096. It must be emphasised that under the purchase order, the first defendant had ordered 2000 coils and delivery was supposedly to be made at the latest within eight (8) weeks from the date of the purchase order.

(iii) In regard to Item 4 in the purchase order, the plaintiff delivered a quantity of 300 coils on 11 June 1997 under delivery order no: 85766. The first defendant had in fact ordered 2000 coils and the time of delivery at the latest should be within eight (8) weeks from the date of the order.

(iv) In regard to Item 5, the plaintiff delivered a quantity of 150 coils on 27 May 1997 under delivery order no: 85080 whereas the first defendant had in fact ordered 2000 coils. It was a case of under supply.

(v) In regard to Item 6, the plaintiff made delivery of a quantity of 250 coils on 17 June 1997 under delivery order no: 85992. It must be emphasised that the first defendant had ordered 2000 coils and the time of delivery was expressly stipulated as "as soon as possible".

(vi) In respect of Items 7 and 8, there was no delivery at all of the goods by the plaintiff.

Flowing from all these, it was argued that the plaintiff had breached the terms of the contract in particular the non-delivery of certain goods, the late delivery of those goods, and the breach in terms of the quantity of the items purchased.

(c) Purchase order no: 0990 dated 7 May 1997

(i) In respect of Items 1, 4 and 7 in the purchase order, the goods were not delivered at all by the plaintiff.

(ii) In respect of Item 3 in the purchase order, the plaintiff made a delivery on 11 June 1997 of a quantity of fifty (50) coils each bearing the following colours: blue, black and yellow under delivery order no: 85767. In regard to delivery order no: 85953, the plaintiff delivered 50 coils of red cable and 100 coils of green cable on 17 June 1997. It must be emphasised that the first defendant had ordered 200 coils each of the respective colours and the delivery was supposed to be made at the latest within eight (8) weeks from the date of the purchase order.

(iii) In regard to Item 4 in the purchase order, the plaintiff delivered a quantity of 100 coils on 17 June 1997 under delivery order no: 85953 notwithstanding the fact that the first defendant ordered 200 coils and the delivery was, at the latest within eight (8) weeks from the date of the purchase order.

(iv) In respect of Item 5 in the purchase order, the plaintiff delivered on 22 July 1997 a quantity of 50 coils of red cables, 80 coils of yellow cables, 80 coils of blue cables and 100 coils of green cables under delivery order no: 87597. It must be borne in mind that the quantity ordered by the first defendant was 200 coils of each colour and the delivery by the latest was within eight (8) weeks from the date of the purchase order.

(v) In regard to Item 6 in the purchase order, the plaintiff delivered on 7 July 1997 a quantity of 27 coils under delivery order no: 87014 notwithstanding the fact that the first defendant ordered 200 coils and the delivery at the latest was said to be within eight (8) weeks of the purchase order.

(vi) In regard to Item 8 in the purchase order, the plaintiff ordered on 26 May 1997 a quantity of 50 coils under delivery order no: 85081 notwithstanding the fact that the first defendant ordered 200 coils.

From the short narratives, arguments were advanced that the plaintiff had committed further breaches of contract in that there were non-delivery of the goods on the one hand, while, on the other hand, the goods were delivered beyond the stipulated time period and not according to the quantity specified therein.

I must now take stock of the situation. The goods that were delivered by the plaintiff were accepted by the first defendant. There was no intimation emanating from the first defendant that the goods sold and delivered were not in conformity with the specifications as stipulated by the first defendant. The first defendant's conduct in accepting those goods that were delivered by the plaintiff without notifying the latter of the alleged unmerchantibility of the goods constituted an acceptance of the goods so delivered. Section 42 of the Sale of Goods Act 1957 (Act 382) would certainly be construed in favour of the plaintiff and that section enacts that:

> The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after a lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.

In my judgment, there was acceptance of those goods and the first defendant had lost its right to reject those goods and the remedy available to the first defendant, if at all, would be confined to damages (*M.G. Sheth & Ors v. Lam Thye Co. Ltd.* [1954] 20 MLJ 230). On the authority of *Eastern Supply Co v. Kerr* [1974] 1 MLJ 1, the first defendant had no valid defence to the plaintiff's claim for the price of the goods sold and delivered. In the face of overwhelming evidence, the first defendant put up a defence of set-off in that by virtue of the failure of the plaintiff to deliver the goods on time and in accordance with the required specifications as set out in the purchase orders, the first defendant was unable to honour its contracts with a third party, namely, HKH Engineering (M) Sdn Bhd thereby causing a loss to the first defendant to the tune of RM326,323.55. This was the very sum that the first defendant counterclaimed against the plaintiff. Order 18 r. 17 of the RHC sets out the defence of set-off and it is worded as follows:

> Where a claim by a defendant to a sum of money (whether of an ascertained amount or not) is relied on as a defence to the whole or part of a claim made by the plaintiff, it may be included in the defence and set-off against the plaintiff's claim, whether or not it is also added as a counterclaim.

Salleh Abas LP (as he then was) in *Permodalan Plantations Sdn Bhd v. Rachuta Sdn Bhd* [1985] 1 MLJ 157 speaking for the then Federal Court differentiates between a "set-off" and a "counterclaim" in these words (see p. 161 of the report):

> It is, therefore, clear that a counterclaim is wider than a defence of set-off and that whilst the former is a separate action by a defendant against a plaintiff, the latter is essentially a defence, although a defendant is entitled to add it as counterclaim. Being a defence to a plaintiff's action, the matter sought to be set-off must essentially be connected with or form part of the matter upon which the plaintiff 's action is founded.

Further down the same page of the same judgment, his Lordship Salleh Abas LP (as he then was) continued in serious vein:

> With this principle in mind in that a set-off is a defence and that if a counterclaim consisting of matters to be set-off is added to the defence, such counterclaim becomes a special kind of counterclaim, and that the set-off must be clearly connected with the claim, let us now examine the three items, which the respondents plead as set-off.

Applying the principles advanced by Salleh Abas LP (as he then was) in *Permodalan Plantations Sdn Bhd v. Rachuta Sdn Bhd (supra)*, the contract between the first defendant and HKH Engineering Sdn Bhd was not related to one another nor was it connected to the claim advanced by the plaintiff. To me, the remedy of the first defendant lies in s. 59 of the Sale of Goods Act 1957 which enacts that:

> (1) Where there is a breach of warranty by the seller, or where the buyer elects or is compelled to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods; but he may:
>
> (a) set up against the seller the breach of warranty in diminution or extinction of the price; or
>
> (b) sue the seller for damages for breach of warranty.
>
> (2) The fact that a buyer has set up a breach of warranty in diminution of the price does not prevent him suing for the same breach of warranty if he has suffered further damage.

and this meant that the first defendant can set-up against the seller – referring to the plaintiff, for the breach of warranty in diminution or extinction of the price or alternatively the first defendant can sue the plaintiff for damages for breach of warranty. Incidentally, there was no affidavit evidence to show that HKH Engineering (M) Sdn Bhd had sued the first defendant on account of the breach of contract between them. In the event HKH Engineering (M) Sdn Bhd were to sue the first defendant, there was nothing to prevent the first defendant from citing the plaintiff as a third party. In my judgment, based on the factual matrix of the case the appropriate remedy available to the first defendant would be by way of a counterclaim and not set-off, alternatively, the first defendant has the option to sue the plaintiff separately in damages for breach of warranty. Justice must be seen to be done and on the available evidence, the O. 14 judgment should be given in favour of the plaintiff. This meant that the plaintiff must succeed in its appeal in encl. 34 with costs. An ancillary order must also be made and it would be in the nature of an order of stay pending the disposal of the hearing of the first defendant's counterclaim since the counterclaim exceeded the plaintiff's claim.

But that would not be the end of the matter. That the first defendant must be held liable and accountable to the debt which was due to the plaintiff can never be doubted. The defendant in their letters dated 20 August 1997 and 12 May 1998 unequivocally admitted and acknowledged liability to the plaintiff's claim. Those two letters were collectively exhibited as "LKK 7" in encl. 13 – the affidavit of Leong Kok Kheng, and their reproductions would speak a thousand words. I will now reproduce the letter dated 20 August 1997:

BAKTI ARENA SDN. BHD.
6-1, Jalan Permata Biru, Taman Cheras Permata,
Cheras, 43200, Selangor.
Tel: 03-9054652/794 Fax: 03-9054846

Our Ref: BA/UC(M) BHD/suc/97
20TH AUGUST 1997
UNIVERSAL CABLES (M) BHD
38 Jalan SS 22/25
Damansara Jaya
47400 Petaling Jaya

ATTN: MR. ALLAN SONG

MR. SIMON LEONG

Dear Sir,

RE: SETTLEMENT OF ACCOUNTS

We refer to the above mentioned and would like to apologize for the delay in our outstanding payment as we are facing some bad collections. As such, we would like to propose a payment plan to enable us to settle our outstanding accounts.

Please note that we would make to you a payment of RM10,000 (Ringgit Malaysia Ten Thousand Only) for a few months. Further be informed that this is only a temporary measure and we would settle our accounts as soon as our bad collections have been solved.

We apologize for any inconvenience caused and we hope that the proposal would be accepted by your goodselves.

Thank you.

Yours faithfully.
BAKTI ARENA SDN BHD
Sgd. (Illegible)
…
Mr. Tony Ho
(Managing Director)

and this would be followed by the letter dated 12 May 1998:

BAKTI ARENA SDN. BHD.
6-1, Jalan Permata Biru, Taman Cheras Permata,
Cheras, 43200, Selangor.
Tel: 03-9054652/794 Fax: 03-9054846

OUR REF: BA/DCC/c.s-uc/sum/98
YOUR REF: 31/0149/97/JL & 31/0150/97/DC/JL

12TH MAY 1998

DEREK CHEW & CO
WISMA KERINGKAT 2
NO: 12A & 13A LORONG BATU CAVES 2
68100 SELANGOR

ATTN: MR. JULIAN LOH

Dear Sir,

RE: KUALA LUMPUR SESSIONS COURT SUMMONS NO: 2-52-2139-98 & KUALA LUMPUR HIGH COURT SUIT NO: S5-22-101-1998

We refer to the abovementioned and regret to inform (you) that we are unable to pay at this juncture the amount owing by us to Universal Cable (M) Sdn Bhd and Chong Shing Cables Sdn Bhd due to unforeseen circumstances.

Also be informed that we have applied a substantial offshore loan which has been approved and our drawdown date would be by (the) end of May or latest (by the) middle of June 98. As such, we would really appreciate if you could kindly advise your clients to withdraw the above summons.

Your immediate attention in this matter is appreciated.

Thank you.

Yours faithfully,
BAKTI ARENA SDN BHD
Sgd. (Illegible).
MR. TONY HO
(Managing Director)

Three observations must be made in regard to these two letters. Firstly, the issue of set-off was not raised at all. Secondly, the issue of counterclaim was also not raised at all. Thirdly, the issue as to the goods that were supplied were not in conformity with the purchase orders were not alluded to at all. Be that as it may, it must be stressed that the goods that were delivered to the first defendant were in a "deliverable state" and so the first defendant, under the contract, was said to be bound to take delivery of them (s. 2 of the Sale of Goods Act 1957 (Act 382)). Section 4(1) of the Sale of Goods Act

1957 (Act 382), hereinafter referred to as the ("SGA"), enacts that a contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price. There may be a contract of sale between one part-owner and another. And under s. 4(2) of the SGA, a contract of sale may be absolute or conditional. Sub-sections (3) and (4) of s. 4 of the SGA defines a "sale" in the following passages. Firstly, "where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale." Secondly, "an agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred." Thus, there is every possibility that a sale within the statutory meaning may materialise in one of two ways: either by a contract which operates to transfer the goods from the seller to the buyer where the property passes when the contract is made; or by a contract which begins as an agreement to sell and later performed or executed by the transfer of the property.

It is the duty of the plaintiff as the seller to deliver the goods and concurrently it is the duty of the first defendant as the buyer to pay the price. The word "delivery" is defined in s. 2 of the SGA as "voluntary transfer of possession from one person to another." All the invoices exhibited collectively as exh. "KEG 1" of encl. 28 carried the following conditions:

TERMS:

It is agreed that interest at the rate of 1.5% per month shall be charged on all overdue accounts.

Please quote invoice number when remitting payment.

Cheques on payment of invoices should be crossed and made payable to Universal Cable (M) Sdn Bhd.

All sales are made subject to our general terms and conditions of sales.

REMINDER:

Any dispute pertaining to this invoice must be lodged in writing to the company within 14 days from the invoice date otherwise the invoice is deemed to be proper and the debt thereof is admitted.

and when the first defendant as the buyer accepted the goods upon delivery, not a single protest in writing was lodged pertaining to the invoice and, consequently, the first defendant must be deemed to have admitted the debt. At this juncture, it is germane to refer to s. 37 of the SGA which enacts as follows (the relevant sub-sections only):

> (1) Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts the goods so delivered he shall pay for them at the contract rate.
>
> (2) Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole. If the buyer accepts the whole of the goods so delivered he shall pay for them at the contract rate.

Thus, where less than the agreed amount is delivered, the buyer has the option to reject what is delivered, or he may accept it by paying for the goods at the contract rate. In *Behrend & Co. Ltd v. Produce Brokers' Co Ltd* [1920] 3 KB 530, the sellers discharged part of the agreed quantity at the agreed port and delivered the balance at that port a few days later and the court held that the buyers were entitled to reject the later delivery while retaining the earlier ones. In *Berger & Co. Inc. v. Gill & Duffus SA* [1984] AC 382, *sub nom Gill & Duffus SA v. Berger & Co. Inc.* [1984] 1 All ER 438, HL, the court held that if the buyer exercised his right to reject the goods, this must be of the whole consignment and not a portion thereof. In such a situation, the *de minimis* rule will apply in that the buyer will not be able to reject the goods if the shortfall is of a bare minimal (*Fairbanks, Lavendar & Son v. Low Bros* [1893] 12 NZLR 302; *Harland and Wolff Ltd v. J. Burstall & Co.* [1901] 6 Com Cas 113; *Farley & Farley v. Loughnan* [1917] NZLR 588; *Ellis & Ellis v. Hodder & Tolley Ltd* [1913] 33 NZLR 362; *William Barker (Junior) & Co Ltd v. Ed T. Agnius Ltd* [1927] 43 TLR 751; and *Wilensko Slaski Towarzystwo Drewno v. Fenwick & Co. Ltd* [1938] 3 All ER 429). Where goods have passed to the buyer and the buyer fails to make payment, the seller has the right to sue for the price.

Breach Of Warranty

An argument was advanced for the first defendant to the effect that since the first defendant had accepted the goods, the first defendant need not treat the contract as repudiated and return the goods to the plaintiff but rather the first defendant was in a position to treat the breach of condition of the contract as a breach of warranty. The argument has since been legislated in the form of s. 13 of the SGA which enacts as follows:

> (1) Where a contract of sale is subject to any condition to be fulfilled by the seller the buyer may waive the condition or elect to treat the breach of the condition as a breach of warranty and not as a ground for treating the contract as repudiated.
>
> (2) Where a contract of sale is not severable and the buyer has accepted the goods or part thereof, or where the contract is for specific goods the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated, unless there is a term of the contract express or implied to that effect.

(3) Nothing in this section shall affect the case of any condition or warranty the fulfilment of which is excused by law by reason of impossibility or otherwise.

Now, when there is a breach of warranty, the contract remains in force and the first defendant as the buyer is restricted to a claim in damages. Section 12(3) of the SGA defines a warranty as a stipulation collateral to the main purpose of the contract, the breach of which gives rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated. Section 12(4) of the SGA enacts that whether a stipulation in a contract of sale is a condition or a warranty depends in each case on the construction of the contract.

The stipulation may be a condition, though called a warranty in the contract. Section 12(1) of the SGA enacts that a stipulation in a contract of sale with reference to goods which are the subject thereof may be a condition or a warranty. Thus, in order to satisfy the definition of a warranty, there must, first, be an agreement between the parties, a promise that the representation is or will be true (*Behn v. Burness* [1863] 3 B & S 751 at 755; *Bentsen v. Taylor, Sons & Co. (2)* [1893] 2 QB 274 CA; *Heilbut, Symons & Co Ltd v. Buckleton* [1913] AC 30, HL; *Oscar Chess Ltd v. Williams* [1957] 1 All ER 325, [1957] 1 WLR 370, CA; and *Dick Bentley Productions Ltd v. Harold Smith (Motors) Ltd* [1965] 2 All ER 65, [1965] 1 WLR 623, CA). Secondly, the agreement must be collateral to the main purpose of the contract and it is for the purpose of transferring the property in and the possession of the goods of the description contracted for to the buyer. The warranty is said to be collateral because the breach of it, unlike the breach of a condition, is not the breach of the whole consideration (*Wallis, Son and Wells v. Pratt and Haynes* [1910] 2 KB 1003 at 1012). Everything hinges on the contract. Whether a stipulation in a contract of sale is a condition, the breach of which gives rise to a right to treat the contract as repudiated, or a warranty, the breach of which may give rise to a claim for damages, depends in each case on the construction of the contract itself (*Cehave NV v. Bremer Handelsgesellschaft mbH, The Hansa Nord* [1976] QB 44, [1975] 3 All ER 739, CA; *Tradax International SA v. Goldschmidt SA* [1977] 2 Lloyd's Rep 604; *Bremer Handelsgesellschaft mbH v. Vanden Avenne – Izegem PVBA* [1978] 2 Lloyd's Rep 109, HL; and *Bunge Corpn v. Tradax SA* [1981] 2 All ER 513, [1981] 1 WLR 711 HL). As demonstrated, s. 12 of the SGA expressly provides that a term essential to the main purpose of the contract where a breach of which will entitle the injured party to terminate the contract, or that a term is collateral to the main purpose of the contract where its breach gives rise only to a claim for damages. There is also another trite principle of law and that is that the injured party is entitled to terminate the contract if the breach goes to the root of the whole contract (*Cehave NV v. Bremer Handelsgesellschaft mbH, The Hansa Nord (supra)*; *Bunge Corpn v. Tradax*

SA (supra); *Montague L. Meyer Ltd v. Kivisto* [1929] 46 TLR 162 CA; *Montague L. Meyer Ltd v. Travaru A/B H. Cornelius of Gamleby* [1930] 46 TLR 553; and *Tsakiroglou & Co Ltd v. Transgrains SA* [1958] 1 Lloyd's Rep 562).

These are general principles of law and upon applying them to the factual matrix of the present appeal, the outcome would be as follows. The first defendant having taken delivery of the goods must be held accountable to pay for those goods and the plaintiff was entitled to sue for the price thereof.

The first defendant, on the other hand, in view of the breach of warranty was entitled to pursue the matter further and claim for damages. This brings me to the issue on damages.

Damages For Breach Of Warranty

I have alluded to s. 59 of the SGA and it allowed the first defendant to sue for damages for breach of warranty. Thus, when the seller sues for the price of the goods, by s. 59(1)(a) of the SGA, the buyer is entitled as a defence to set up the breach of warranty in diminution or extinction of the price. Furthermore, s. 59(2) of the SGA makes it clear that if the buyer "has suffered further damage", the buyer is not precluded from bringing a separate action for damages even though the buyer may have already set up the mechanism of a breach of warranty in diminution of the price. The case of *Mondel v. Steel* [1841] 8 M & W 858 immediately comes to mind when one is confronted with a situation under s. 59 of the SGA. In that case, a buyer purchased a ship. The ship was built and it was discovered to be defective. When the seller sued for the price, the buyer set up, as a defence, the seller's breach of an express warranty as to quality. At that stage, the buyer's damages were calculated on the basis of the difference between the actual value of the ship at the date of delivery and its worth if built to the contractual standard. Later, when the buyer sued for further damages for the cost of repairs to the ship, the court held that, in relation to the earlier case, the buyer has defended himself and to that extent the buyer had obtained an abatement of the price on account of the breach. The court considered the buyer as having received satisfaction for the breach of contract and was thus precluded from recovering in another action to that extent, and no more.

Restitutio in integrum. If the first defendant as a buyer has suffered damage that was not too remote, the first defendant must, so far as money can do it, be restored to the position the first defendant would have been in had that particular damage not occurred (*Robinson v. Harman* [1848] 1 Ex 850; *Wertheim v. Chicoutimi Pulp Co* [1911] AC 301 at 307; *The Edison* [1932] P52 at 62-63; and *B. Sunley & Co Ltd v. Cunard White Star Ltd* [1940] 1 KB 740 at 745, [1940] 2 All ER 97 at 100). On remoteness of damages, Edgar

Joseph Jr J (as he then was) in *Popular Industries Ltd v. Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360, [1990] 1 CLJ 133, aptly observed at p. 366 and p. 140 respectively:

> When a plaintiff claims damages from a defendant, he has to show that the loss in respect of which he claims damages was caused by the defendant's wrong, and also that the damages are not too remote to be recoverable. The principle of remoteness of damage is a limiting principle of policy and the principles applicable in contract and tort are not the same (see *Koufos v. Czarnikow Ltd (The Heron II)* [1969] 1 AC 350).

and in the context of the present appeal, when the word "plaintiff" in the passage is substituted with the words "first defendant", and the word "defendant" in the passage is substituted with the word "plaintiff", then the effect of remoteness of damages can truly be appreciated, after all the object of an award of damages is to compensate actual loss, at least in so far as money can do it. Towards this end and in this respect, awards of damages in tort and in contract are similar. They differ in the bases upon which they are calculated. As the law now stands, damages in tort are awarded to place the aggrieved party in the position he or she would have occupied but for the tort complained of. This means that it is a matter of restoring that party to the position that he or she occupied previously. In contract, however, damages are awarded to place the aggrieved party in the position that he or she would have occupied had the contract been performed as agreed. Tortuous damages are therefore calculated by simply looking at what the position was before the tort, while contractual damages are calculated by looking at what the position should have been after proper performance of the contract. Baron Parke in *Robinson v. Harman* [1848] 1 Ex. 850 at 855, 154 ER 363 at 365 explained it nicely in these words:

> Where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.

and this very passage was recently adopted and approved in *Commonwealth of Australia v. Amann Aviation Pty Ltd* [1991] 174 CLR 64.

What is the concept underlying the principle of remoteness ? The answer is simple. It is neither just nor practicable to hold a defendant liable in damages for every consequence of a breach of contract no matter how unusual or unexpected those consequences might be. I repeat damages are recoverable and are limited to those which are not too remote. The principle was first propagated and enunciated in the case of *Hadley v. Baxendale* [1854] 9 Ex 341, 156 ER 145. The facts of that case are quite simple and straightforward. The plaintiffs in that case were mill owners in Gloucester and they engaged the defendant carrier to take a broken crankshaft to Greenwich to be used as a pattern for a new one. The carrier promised it would be there the next

day. In breach of this contractual undertaking the crankshaft was delayed in transit, the replacement was not delivered when it should have been and the mill was out of commission for longer than should have been the case. The mill owners claimed damages for loss of the profit that they would have earned if the replacement shaft had been available on time. The court rejected the plaintiffs' claim. The carrier had only been told that the item he was to carry was a crankshaft from the mill and that the people engaging his services were the millers. He was not told that the mill would be inoperative until a new crankshaft was obtained and, as the millers might have had a spare, it was not reasonable in the circumstances to hold him responsible for the loss of profit. Alderson B had this to say at p. 354 and at p. 151 respectively:

> Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, that is, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.

and it is now as clear as crystal that, in law, damages are only recoverable for those losses which:

(a) arise naturally from the breach; or

(b) are actually contemplated as a probable result of the breach.

In the words of Lord Reid in *Koufos v. Czarnikow Ltd* [1969] 1 AC 350 at 385:

> The crucial question is whether, on the information available to the defendant when the contract was made, he should or the reasonable man in his position would, have realised that such loss was sufficiently likely to result from the breach of contract to make it proper to hold that the loss flowed naturally from the breach or that loss of that kind should have been within his contemplation.

These brief expositions of the law, would come in handy for the first defendant when the latter sues the plaintiff separately in damages for breach of warranty.

The Guarantee And Indemnity Dated 4 July 1997

In the affidavit of the second defendant that was affirmed on 2 July 1998 and filed on the next day as seen in encl. 18, both the second and the third defendants admitted executing the guarantee and indemnity dated 4 July 1997 but they contended:

(a) that the plaintiff failed to deliver the goods in conformity with the specifications, quantity, time and price as set out in the purchase orders of the first defendant and as a result thereof, the first defendant suffered loss.

(b) That the second and the third defendants were entitled to a defence of set-off in regard to the loss and damage suffered by the purported breach of contract by the plaintiff.

(c) That the guarantee and indemnity dated 4 July 1997 was said to be void for failure of consideration as the terms in respect of time and credit to be given by the plaintiff to the first defendant were said to be unclear and ambiguous.

(d) that, in the alternative, the proceedings herein were premature as the time and credit given by the plaintiff to the first defendant for payment have yet to expire.

(e) that the admission letters dated 20 August 1997 and 12 May 1998 should not be considered by the court as it would be prejudicial to the defendants.

I have since perused through encl. 18 together with the guarantee and indemnity that was exhibited in encl. 13 marked as exh. "LKK 1", and I have no choice but to reject the contentions of both the second and the third defendants as alluded to above as misconceived and were without merits for the following reasons:

(1) That if there was any defect in the goods that were delivered by the plaintiff, which definitely was not the case here, that cannot be used as a ground for both the second and the third defendants to deny liability because there was no stipulation to that effect in the guarantee and indemnity dated 4 July 1997. In the guarantee and indemnity, both the second and the third defendants guaranteed to the plaintiff that on demand, payment shall be made for the goods delivered to the first defendant.

(2) That both the second and the third defendants were not entitled to a defence of set-off because it had not been pleaded in their defence.

(3) That the first defendant was given ample time and credit by the plaintiff to settle the outstanding debt. For instance, the last delivery of the goods took place sometime in July 1997, yet the notice of demand was only sent out on 26 November 1997.

(4) That both the second and the third defendants were fully aware of the interest chargeable at the rate of 1.5% monthly to be calculated on a daily interest because this was provided for in the guarantee and indemnity which both of them admitted executing.

(5) That copies of the plaintiff's delivery orders and invoices to the defendants as seen in exhibit marked as "LKK 2" in encl. 13 clearly stated that interest at the rate of 1.5% per month shall be charged on all overdue accounts.

(6) That the plaintiff's claim was not premature because the admission letters dated 20 August 1997 and 12 May 1998 clearly showed that the first defendant did not deny the claim and that the first defendant was merely asking for time and indulgence to settle the outstanding sum.

(7) That the admission letters of the first defendant dated 20 August 1997 and 12 May 1998 did not prejudice the defendants because they were rightly and justly indebted to the plaintiff in regard to the sum claimed. At any rate, it was not open for the second and third defendants to challenge the contents of the admission letters nor advance the probable intention behind the admission letters because the affidavit in encl. 18 was deposed by the second defendant on behalf of himself and that of the third defendant but the second defendant did not depose that affidavit in encl. 18 on behalf of the first defendant.

It would be germane, at this juncture, to reproduce the guarantee and indemnity in exh. "LKK 1" in encl. 13 in order to obtain a bird's eye view of the whole matter. It was worded as follows:

GUARANTEE AND INDEMNITY

To: UNIVERSAL CABLE (M) BHD

In consideration of **UNIVERSAL CABLE (M) BHD.** (hereinafter called "The Company") agreeing to grant time and credit to **BAKTI ARENA SDN BHD** (hereinafter called "The Customer"), I/we the undersigned hereby jointly and severally agree and guarantee as Principal Debtor/Principal Debtors and not merely as surety/sureties on the following:

1. I/we hereby guarantee the payment of all monies now or at any time or times become due to you in respect of any goods and/or services supplied to The Customer including interest thereon at the rate of 1.5% per month (at monthly rest) to be calculated on a day to day basis chargeable by you on goods and services supplied on credit to The Customer from the due date of payment to the date of actual receipt of payment.

2. Failure by The Customer to effect the above, I/we guarantee that I/we shall on demand pay to you all monies due from The Customer for goods and/or services supplied to The Customer on credit together with interest thereon at the aforesaid rate from the due date of payment to the date of actual receipt of payment.

3. The Company may at any time or times at its absolute discretion and without giving any notice whatsoever to us, refuse to grant further time and other indulgence to The Customer without discharging or impairing our liability under this Guarantee and Indemnity. *a*

4. Any Statement of Account or such documents between The Customer and The Company regarding any outstanding amount due to The Company at any time will be accepted by us as conclusive evidence of the extent of our liability under this Guarantee and Indemnity. *b*

5. Any notice or demand made by you hereunder may be served on me/us personally or sent to me/us by post to my/our address stated overleaf or my/our last known address and if sent by post shall be conclusively deemed to have been received by me/us within 48 (forty eight) hours after the time of posting notwithstanding any evidence to the contrary. *c*

6. I/we agree that this Guarantee and Indemnity shall be a continuing guarantee and my/our obligations shall not be discharged except by performance and then only to the extent of such performance and without prejudice to the generality of the aforesaid this Guarantee and Indemnity shall not be considered as satisfied by any intermediate payment or satisfaction pursuant to any demand made by you from The Customer for goods and services supplied on credit. *d*

e

7. I/we further agree that my/our liability under this Guarantee and Indemnity shall not be in any way discharged, diminished or affected by the granting of time or indulgence to The Customer or by the effecting of any compromise with The Customer or any agreement not to sue The Customer and my/our liability hereunder shall subsist whether or not you have availed yourself of your legal remedies against. The Customer. *f*

8. I/we agree to reimburse you on demand all expenses and legal fees incurred by you in connection with the recovery of any debt owing by The Customer to you in respect of any goods and/or services supplied by you (on a full indemnity basis) and to indemnify you against any loss or damage you may sustain as a result of supplying goods and/or services to The Customer on credit. *g*

9. I/we shall reimburse you on demand all expenses and legal fees incurred by you in connection with any legal proceedings taken against me/us by reason of my/our failure to perform my/our obligations and covenants herein contained (on a full indemnity basis). *h*

10. I/we further agree that my/our obligations hereunder shall be binding on my/our personal representatives, successors in title and assigns.

i

11. I/we hereby covenant that I/we shall prior to our revocation or this Guarantee and Indemnity arrange a replacement guarantor/guarantors acceptable to The Company and shall procure the replacement guarantor/ guarantors to execute a guarantee substantially in the form of this Guarantee and Indemnity. Until execution of the new Guarantee and Indemnity by the replacement guarantor/guarantors and/or settlement in full by The Customer of all accounts and liabilities incurred before the date of execution of the new Guarantee and Indemnity I/we shall continue to be liable for all outstanding accounts and/or liabilities incurred by The Customer.

12. You may enforce this Guarantee and Indemnity against me/us at any time and this Guarantee and Indemnity shall not be determinable by me/ us except on the terms of making full provision of all sums owing by The Customer together with interest thereon.

Dated this 4th day of July 1997

Signed by: (Illegible). Guarantor	Signed by: (Illegible). Witness
Name: HO FOON FOO	Name: LINDA YAP SIEW KIM
I/C No: 5883471	I/C No: 5047506
Permanent Add: 32, JLN AMAN 5, TMN SERI AMAN, 43200 CHERAS, SELANGOR CHERAS	Permanent Add: 17 JLN PERTUNIA TMN MUDUN, 43200 BT 9 DARUL EHSAN SELANGOR
Occupation: MANAGING DIRECTOR	Occupation: OFFICE ADMINISTRATOR
Signed by: (Illegible). Guarantor	Signed by: (Illegible). Witness
Name: HO FOON CHEONG	Name: GOH AI KUAN
I/C No: 7160094	I/C No: 2732435
Permanent Add: 1-1, JLN 13/ 144A, TMN BUKIT CHERAS, 56000 KUALA LUMPUR	Permanent Add: 21, JLN BUNGA KERTAS TMN MUDUN, 43700 CHERAS, SELANGOR
Occupation: DIRECTOR	Occupation: A/cs EXECUTIVE

A HUSBAND MUST NOT WITNESS THE SIGNATURE OF HIS WIFE AND VICE VERSA

I have extolled the differences between a guarantee and an indemnity in the case of *Siow Kwang Joon & Anor v. Asia Commercial Finance (M) Bhd* [1996] 3 MLJ 641 and at p. 660 of the report, I had occasion to say as follows:

> I have explained the differences between a contract of guarantee and a contract of indemnity in *Hong Leong Finance Bhd v. Thamilchelevan s/o Palinesamy & Anor* [1996] 1 MLJ 351 where at p. 360, I said:
>
> > In essence, a guarantee is the promise of one person to be answerable for the debt or obligation of another if that other defaults (see *Moschi v. LEP Air Services Ltd* [1973] AC 331; [1972] 2 All ER 393; [1972] 2 WLR 1175).
>
> At p. 361 of the same case, I said:
>
> > Whereas the contract of indemnity is said to be 'a contract by one party to keep the other harmless against loss' (*Yeoman Credit Ltd v. Latter* [1961] All ER 294; [1961] 1 WLR 828 at pp. 830-831) and is not dependent on the continuing liability of the principal debtor.

The approach to be adopted in construing a document like the guarantee and indemnity in the present was also explained in the same case in the following manner (see p. 661 of the report):

> All the cases show the need to construe the agreement in a reasonable way by taking into account all the surrounding circumstances. I need to cite only three cases on this point. The first would be *Oriental Bank of Malaya Ltd v. N Subramaniam* [1958] 24 MLJ 35, where it was held that the letter of guarantee must be construed with regard to the surrounding circumstances. The second is the case of *Chow Yoke Pui v. Hongkong & Shanghai Banking Corporation, Malacca* [1971] 2 MLJ 100, where the Federal Court held the view that a guarantee must be construed reasonably by looking at the surrounding and special circumstances and also by construing the words employed therein. The third is the case of *Bank Bumiputra Malaysia Bhd v. Esah bte Abdul Ghani* [1986] 1 MLJ 16, which cited favourably a passage from the judgment of Fry J in *Lloyd's v. Harper* (1880-81) 16 Ch D 290 in the following terms:
>
> > A guarantee, like every other contract, must be construed reasonably; it must be construed by the words used, but also with regard to the surrounding circumstances.

A formal notice of demand dated 26 November 1997 as seen in exh. "LKK 5" of encl. 13 was extended to the second defendant. Another notice of demand worded in the same fashion and dated on the same date as seen in exh. "LKK 6" of encl. 13 was also extended to the third defendant. They were good

demand notices and both the second and the third defendants cannot turn around and say that those demand notices were bad. They were not carbon copies of the demand notices like what had happened in the case of *Mok Hin Wah & Ors v. United Malayan Banking Corp Bhd* (1987) 2 MLJ 610. As Lee Hun Hoe CJ (Borneo) said in *Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri bin Wan Rashid v. Kwong Yik Bank Berhad* [1989] 3 MLJ 155:

> The first thing to do is to look at the letter of guarantee. The liability of the guarantor depends very much on the language of that instrument and the nature of liability it creates. A guarantor is therefore entitled to insist on a rigid adherence to the terms of his obligation by the creditor, and cannot be made liable for more than he has undertaken …

Both the second and the third defendants as guarantors have no special right in law to demand that the plaintiff should call upon the first defendant as the principal debtor to pay off the debts (*Bank Bumiputra Malaysia Bhd v. Esah bte Abdul Ghani* [1985] 2 CLJ 409; [1986] 1 MLJ 16). In my judgment, if the first defendant as the principal debtor was unwilling to pay the outstanding debt, the plaintiff as the creditor can proceed after both the second and the third defendants who were the guarantors to the whole transaction. Gunn Chit Tuan J (as he then was) in *Perwira Habib Bank Malaysia Bhd v. Syarikat Johor Tenggara Sdn Bhd & Anor* [1989] 2 CLJ 470; [1989] 2 MLJ 476, 478 relied on the following passage from *Halsbury's Laws of England,* 4th edn, at para. 190:

> ... recognize business realities by taking notice of the commercial purpose of guarantees, the purport, utility and obvious intent of which are to ensure that creditors would be paid early by guarantors when the principal debtors are unable or unwilling to do so.

and his Lordship then held that the right way – indeed the only correct and appropriate way, of construing the guarantee was to construe it as a whole against the factual matrix of the background of the case and his Lordship then proceeded to exclude all set-offs and counterclaims.

The guarantee and indemnity by cl. 6 thereof was continuing. Siti Norma Yaakob J (now JCA) in *Perwira Habib Bank Malaysia Bhd v. Fast Travel (M) Sdn Bhd & Ors* [1988] 3 MLJ 210 especially at p. 211 had this to say of continuing guarantee:

> A continuing guarantee such as the one in this case has been held in the case of *Heng Cheng Swee v. Bangkok Bank Ltd* [1976] 1 MLJ 267 to include guaranteeing not only facilities existing at the time of the execution of the guarantee but also facilities to be made in the future. As such there is good consideration given to both the continuing guarantees. A continuing guarantee is quite unlike the guarantee that was decided in the case of *Chew Soon Tat*

v. Malaysia National Insurance Sdn Bhd [1977] 1 MLJ 241 and the one considered in *Perwira Habib Bank Malaysia Bhd v. Foo Ah Chai* [1987] BLD (Aug) 494.

In *Bank Bumiputra Malaysia Bhd v. Perbadanan Kemajuan Negeri Perak* [1989] 1 MLJ 502, Malek Ahmad J (now FCJ) spoke of a conclusive evidence clause in a guarantee by referring to two authorities and this was what his Lordship said at p. 503 to p. 504 of the report:

> It is relevant at this point to refer to *Dobbs v. The National Bank of Australasia Ltd* [1935] 53 CLR 643. In that case, a clause in a guarantee given to a bank provided that a certificate signed by the manager of the office at which the principal debtor's account was kept should be conclusive evidence of his indebtedness at a particular date. It was held that the clause was not contrary to public policy as ousting the jurisdiction of the court and was therefore not void and that a certificate given pursuant to that clause was conclusive upon the parties of the amount and existence of the principal debtor's indebtedness.
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> In *Bache & Co. (London) Ltd v. Banque Vernes Et Commerciale De Paris SA* [1973] 2 Lloyd's Rep 437, the plaintiffs, commodity brokers on the London Commodity Exchange, demanded a bank guarantee before entering into buying and selling transactions on behalf of their customer, a French trading company. The defendants, who were the trading company's bankers, gave the guarantee which contained a conclusive evidence clause providing that the amount stated in the notice of default shall be conclusive evidence of the amount claimed. Lord Denning MR stated in his judgment that 'this commercial practice of inserting conclusive evidence clauses is only acceptable because the bankers or brokers who insert them are known to be honest and reliable men of business who are most unlikely to make a mistake. Their standing is so high that their word is to be trusted so much so that a notice of default given by a bank or a broker must be honoured.

and in the context of the present appeal, the conclusive evidence clause appeared at cl. 4 of the guarantee and indemnity and when read with the demand notices that itemised the extent of both the second and the third defendants' liabilities, it clearly showed the amount and the existence of the first defendant – the principal debtor's indebtedness.

Another case of interest would be *Chatterton v. Maclean* [1951] 1 All ER 761. In that case the guarantor of a hire purchase agreement relating to a motor car disclaimed liability on the ground that by accepting the hirer's breach of contract as repudiation of the agreement, the company had released all its rights under that agreement. It was held by Parker J that the hirer remained under any liability which had already accrued at the date of the repudiation and his Lordship said, at p. 764 of the report:

> If he remained liable for the accrued liability – and, of course, it was only right that he should remain liable, because he had had the benefit of the car for the period relating to it – *prima facie*, he being liable and the sum not having been paid, the guarantor is liable under his guarantee.

This would be followed by the case of *Lep Air Services* case [1973] AC 331. It was a case where in consideration for relinquishing a lien the debtor agreed to pay 40,000 pound he then owed by weekly instalments of 6,000 pound. The contract included a guarantee by Mr. Moschi. The debtor defaulted in his obligations from the outset. The creditors treated his breaches of contracts as repudiation and accepted it. They then sued the debtor for damages and the guarantor for the full amount of the weekly instalments less what had been paid. At the time the action was commenced, a number of instalments had accrued due. They claimed against the guarantor the amounts which had become due and those which would have become due if the debtor's repudiation had not been accepted – in short, the total amount. Megaw L.J. in the Court of Appeal: [1971] 1 WLR 934, delivering the judgment of the court, had this to say at p. 941 of the report:

> It is we think, plain beyond any real argument that an accrued liability for breaches of contract does not change its character so as to release the guarantor from his already existing liability in respect thereof, merely because the creditor has elected to exercise the right which is given to him as an incident of the general law of contract: the right, namely, to accept the wrongful repudiation constituted by those breaches, and thus to be enabled to treat the principal debtor's future obligations under the contract as having been irrevocably broken as from that moment. The mere fact that the creditor is thereupon entitled to additional damages in respect of the resulting immediate breach of the principal debtor of future obligations under the contract cannot have the effect of releasing the guarantor from his already existing liability referable to that already existing accrued liability of the principal debtor. The essential nature of that accrued liability is in no way changed.

In my judgment, the liability to pay under the guarantee and indemnity is emphasised by the guarantors' express undertakings to pay "on demand" and "on a full indemnity basis" when and upon the first defendant's default in payment. The failure of the first defendant to pay did not impinge on the guarantors' liability in any way. This was a simple case of the failure of the first defendant to pay on time and the guarantors' have no choice but to pay.

Lack Of Bona Fides In The Defences Of The Defendants

The defences filed on behalf of the defendants were inconsistent and the *bona fides* were highly suspect for the following reasons:

(1) The first defendant admitted delivery of the goods by the plaintiff (at para. 4 of the first defendant's defence) while both the second and the third defendants denied that this was so (at para. 10 of the second and the third defendants' defence).

(2) The second and the third defendants have pleaded that the plaintiff was not entitled to charge interest at the rate of 1.5% per month on the outstanding sum and that the terms for time and credit were said to be unclear and ambiguous (at para. 7(b) of the defence) while the first defendant merely pleaded a bare denial in para. 5 of the first defendant's defence. Mere denials can never dislodge the debt that was due (*Chong Chow Fong v. Ban Tuck (M) Sdn Bhd* [1983] 2 CLJ 25; and *Huo Heng Oil Co. (E.M.) Sdn Bhd v. Tang Tiew Yong* [1987] 1 MLJ 139).

(3) The defendants merely denied that interests for late payments were due. To me this can never constitute a triable issue (*Daya Anika Sdn Bhd v. Kuan Ah Hock* [1998] 6 MLJ 537).

(4) Both the second and the third defendants have denied executing the guarantee and indemnity in their defence but in the affidavit affirmed by the second defendant in encl. 18 both of them admitted executing that precious document (at para. 11 of encl. 18).

(5) The defendants had ample opportunity of raising the issues of non-conformity of the plaintiff's goods in regard to specifications, set-off and counterclaim but, alas, they failed to do so even after they were in receipt of the demand notices dated 26 November 1997 (exhibits marked "LKK 4", "LKK 5", and "LKK 6" of encl. 13). The court in *Emperee Industries Sdn Bhd. v. Genageo Sdn Bhd* [1987] 1 CLJ 477 said that where there has been no protest to the invoices issued by the plaintiff, deliveries were said to be concluded pursuant to the contract with the defendants.

(6) The plaintiff's delivery orders bore the following legends:

> Goods sold are not returnable after fourteen (14) days from date of delivery.
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> Delivery excludes unloading costs.
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> Interest of 1 ½ % per month will be charged on all overdue account.
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> Any discrepancy on the invoice must be communicated to us within fourteen (14) days of receipt of invoice otherwise the invoice is deemed to be proper and the debt thereof is admitted.

and the defendants have not, at any time, intimated to the plaintiff their objections in respect of the goods that were delivered to the first defendant nor in regard to the levy of interest for late payments. It was now too late, in the day, to set up that kind of defence. Section 42 of the SGA which is worded as follows:

> The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.

would certainly be activated in favour of the plaintiff. All the documents favoured delivery and acknowledgment of the goods just like the case of *Mulpha Engineering Sdn Bhd v. Polycool Engineering & Trading Sdn Bhd & 2 Ors* [1994] 2 CLJ 634.

Conclusion

For the reasons adumbrated above, the appeal by the plaintiff in encl. 34 was allowed with costs. An ancillary order was also made and that would be an order of stay pending the disposal of the hearing of the first defendant's counterclaim since the counterclaim exceeded the plaintiff's claim.

There were other inconsequential issues that were raised by the parties but were not considered in this judgment. Legal practitioners engaged in litigation works have a knack to submit on all matters, under the sky, notwithstanding that those matters are not related to the issues at hand. This practice must stop. Crafty and devious lawyers must be put to notice that the courts will not tolerate manoeuvres that unduly prolong the proceedings.